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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY.

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We believe that a few comments on plaintiffs' brief will be of assistance to the Court.

The argument contained in plaintiffs' brief does not lead to an affirmative answer of the question certified because:

(A) Counsel's analysis of the situation prior to the adoption of the Federal Rules of Civil Procedure (Brief, pp. 6-8) overlooks the sharp line of demarcation between the law side and the equity side of the Federal Court which was the basis of this Court's reasoning in the *Enelow* case; and

(B) It overlooks the change which Rule 2 of the Federal Rules of Civil Procedure has made by transforming what was held in the *Enelow* case to be an injunction of a separate proceeding, into a mere stay of the same proceeding.

A.

Plaintiffs' analysis of the situation prior to the adoption of the Federal Rules of Civil Procedure (Brief, pp. 6-8) overlooks the sharp line of demarcation between the law side and the equity side of the court, which was the basis of this Court's reasoning in the *Enelow* case.

It is essential to remember that prior to the adoption of the new Rules, the law and equity sides of the District Court were as distinct as the criminal, bankruptcy, or admiralty sides now are from each other and from the civil side of the court. The distinction between the law and equity sides was based upon the separate procedures in each: State practice, pursuant to the Conformity Act, governing the conduct of actions at law, and rules promulgated by this court governing procedure in suits for equitable relief. Furthermore, the clerk of the District Court was required to keep separate record books for law and equity proceedings. Equity Rule 3. Congress in Sections 274a and 274b of the Judicial Code (28 U. S. C. A., Sections 397, 398) referred specifically to the law side and the equity side of the court. Indeed, so sharp was the line dividing them that a Congressional enactment was necessary to enable a cause to be transferred from one side of the court to the other. Judicial Code, Section 274a (28 U. S. C. A., Section 397). Prior to that enactment, a case started in the wrong side of the court had to be dismissed. *Rogers* v. *Durant*, 106 U. S. 644; *Buzard* v. *Houston*, 119 U. S. 347. These considerations furnish ample reason why this Court in the *Enelow* case regarded the law and equity phases of a case as separate proceedings pending in different tribunals.

All this is what now has been changed by the adoption of the Federal Rules of Civil Procedure. The division

between the law and equity sides of the court has been wiped out. Rule 2 has superseded Section 274b of the Judicial Code. Equity Rule 3 has been succeeded by Rule 79, which requires the clerk to keep one single docket for all civil cases regardless of whether legal or equitable relief or both may be sought therein. The provisions in Rule 79(c) for separate calendars for "jury actions" and "court actions" is obviously necessary in the practical handling of the work of the Court, nor does it mean a carry-over of the old distinction between law actions and equity suits, since, in view of the implied waiver of jury trial provided for in Rule 38(d), many claims for money damages are now tried by the Court sitting alone.

Nor does the case of *Modin* v. *Matson Navigation Company*, 128 Fed. (2) 194 (cited p. 5 and p. 17 of plaintiffs' brief) indicate that the doctrine of the *Enelow* case is still applicable to the situation at bar. The *Modin* case involved an order transferring a case from the civil to the admiralty docket. The admiralty and civil sides of the District Court today are just as distinct as the law and equity sides were prior to the new Rules. The *Modin* case does not say that the law and equity sides still exist, and it does not constitute the application of the doctrine of the *Enelow* case to a situation governed exclusively by the Federal Rules of Civil Procedure. The *Modin* case is not in point.

All of the other cases cited by the plaintiffs in their brief (pp. 4 and 5), as invoking the doctrine of the *Enelow* case, were decided prior to the effective date of the new Rules and hence are not in point.

B.

Furthermore, the plaintiffs' analysis of the situation as affected by the adoption of the Rules of Civil Procedure

(p. 8ff.) overlooks the basic distinction between a stay and an injunction. The statement on page 8 that "what was done in the *Enelow* case and what defendant says *cannot* now be done, actually *was* accomplished in the present case," indicates the complete ignoring of this distinction. True, in the case at bar, as in the *Enelow* case, the trial by a jury of the issues raised on plaintiffs' claim for money damages is to be delayed until after a trial by the Court of the issues raised on defendant's claim for rescission of the contract, but the significant question is whether such a ruling by the trial judge is to be regarded as a stay of the same proceeding pending in the same court or as an injunction of a separate proceeding pending in a different Court, in accordance with the distinction laid down by this Court in the *Enelow* case and discussed at length by Judge VanDevanter in *Griesa* v. *Mutual Life Insurance Company*, 165 Fed. 48, 50, 51. (see p. 6 and p. 12 of our main brief).

We say that the promulgation of Rule 2 of the Federal Rules of Civil Procedure has had the effect of changing what was held in the *Enelow* case to be an injunction of a separate proceeding, into a stay of the same proceeding. This is because the former separate law and equity sides of the court have been fused into one civil side, and because the former different procedures in law and equity matters have been succeeded by one uniform system of procedure. Our argument is not answered by calling attention to the substantive distinction between law and equity which still persists in the federal courts. The question certified does not deal with this distinction. It merely deals with a question of procedure. It is still true as Dean Pound observed that "equity continues to exist though separate equity practice disappears" (plaintiff's brief, p. 13). Under the new Rules the same remedies are obtainable as could

have been obtained formerly in either a law court or an equity court; the same facts must still be shown to entitle a party to the kind of relief which he seeks as was formerly the case; a party still has the same right to a jury trial that he has alway had. In other words, substantive rights, the principles of decision which determine what kind of relief, if any, a party is entitled to in a given situation, and the distinction between legal and equitable rights and remedies still remain unchanged. We do not deny these things. On the contrary, they form the substantive basis of the counterclaim herein.

But while these distinctive legal and equitable rights still stand, the procedure for their enforcement has been changed. The Federal Rules of Civil Procedure, while preserving the substantive distinction between law and equity, have abolished the procedural distinction, so that it cannot now be said that the case at bar, which lies entirely within the civil side of the District Court, and every phase of which is controlled by the same rules of procedure, constitutes two separate proceedings pending in two separate courts. Accordingly, it seems perfectly clear that the postponement of the jury trial of the issues raised by plaintiffs' complaint until after the trial by the court of the issues raised by the counterclaim must, in accordance with the distinction laid down by this court in the *Enelow* case, be regarded as a stay and not as an injunction.

On pages 10 to 11, plaintiffs argue that the counterclaim constitutes a separate proceeding because of the provisions in Rule 13(i) for entry of separate final judgment on a counterclaim. Not so.

Rule 13(i) provides for separate judgment only where there has been a separate trial as provided in Rule 42(b). These rules must be read in connection with Rules 8(a) and

18, which permit joinder of claims and rem dies, and with Rules 38 and 39, which deal with the form trial for various issues in the cause. It is clear that separate trials of various issues in a case do not transform one proceeding into several separate and distinct litigations. That this is particularly true under the Federal Rules of Civil Procedure is demonstrated by what Judge Charles E. Clark said for the Second Circuit Court of Appeals in *Sherwood* v. *United States*, 112 Fed. (2) 587 (reversed on other grounds, 312 U. S. 584) at 591:

> "But it is a commonplace of the state code action, with its possible numerous and diverse issues, that different forms of trial may be necessary for different issues. Such necessity does not prevent the all-inclusive nature of the action and the procedural gains which result from a settlement of all angles of a dispute in a single adjudication. The new federal rules expressly adopt this practice. Form of trial is determined for each issue, not for the action as a single unit. Rules 38 and 39; James, Trial by Jury and the New Federal Rules of Procedure 45 Yale L. J. 1022; Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 U. of Pa. L. Rev. 645."

Nor does the fact that such a final judgment may be appealable indicate that the counterclaim is part of a separate proceeding pending in a different court from the action based on plaintiffs' claim. Plaintiffs' argument is contrary to the whole theory of appeals in the Federal Court, which is that, generally speaking, the actions and rulings of the Trial Judge in conducting a case may not be reviewed until after final judgment. Judicial Code Section 128 (28 U. S. C. A., Section 225). The only interlocutory orders

which are appealable are those whose effect extends beyond the manner in which the cause is to proceed to final judgment, namely, orders relating to injunctions and receivers. Judicial Code Section 129 (28 U. S. C. A., Section 227).

For as Judge Goodrich aptly said in *Cohen* v. *Globe Indemnity Co.* (C. C. A.—3) 120 Fed. (2d) 791:

> "We are confronted at the outset with the question whether this appeal is premature. Our jurisdiction is not discretionary; it is settled by statute. Neither the parties nor the court can hear a question just because it would be convenient for everyone to have an authoritative ruling upon a question at some stage of the litigation prior to its completion."

Such being the situation created by Congress, the Federal Rules of Civil Procedure, as part of their effort to speed up the administration of justice, provide in Rule 54(b) for the entry of separate judgments with respect to separate phases of the case, so that an appeal may be had as promptly as possible. This is the basis upon which this Court grounded its decision in *Reeves* v. *Beardall*, 316 U. S. 283.

Rule 54(b), which was before this Court in the *Reeves* case, provides for entry of judgment at various stages only "upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim". The significance of this Rule lies in its recognition that plaintiffs' claim and a counterclaim arising out of the same transaction (such as is the situation at bar) constitute a unity and that one may not be disposed of by the Court without reference to the other. Rule 54(b) is a complete answer to plaintiffs' argument that the complaint and the

counterclaim herein constitute separate proceedings pending in different courts.

In *Reeves* v. *Beardall*, 316 U. S. 283, a judgment dismissing the Second Count of the complaint was held final, and hence appealable. But the Second Count was a claim based on entirely different transactions from those forming the basis of the other counts in the complaint, and it was for this reason that the judgment of dismissal was held final and appealable. The *Reeves* case is not relevant for present purposes because the facts were different from those in the instant case and because the legal question presented was entirely different. There is no suggestion whatever in the *Reeves* case that a complaint and counterclaim which are both based upon the same transaction constitute separate litigations in separate tribunals.

Conclusion.

Plaintiffs' argument is premised upon the *Enelow* case. They accept the doctrine of that case and contend that the application of that doctrine to the situation presented herein leads to the conclusion that the order of December 23, 1941, constitutes an injunction, and hence is appealable.

However, if the plaintiffs accept the doctrine of the *Enelow* case at all they must accept all of it. The cornerstone of the doctrine of the *Enelow* case is the distinction which this court carefully pointed out between an injunction—"the power to stay proceedings in another court"—and "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice."

The question certified to this court requires a determination of which side of the line thus drawn the present case falls. We submit that the order of December 29, 1941, falls clearly within the category of a stay which the District Court entered with respect to part of the proceedings pending before it, and that it is anachronistic (see *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 169) to say that that order constituted an injunction of proceedings in another court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1942.

Adrian Ettelson, Joseph A. Feder, Jack Rinzler, et al., vs. Metropolitan Life Insurance Company.	On Certificate from United States Circuit Court of Appeals for the Third Circuit.

[December 7, 1942.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals has certified the following question:

In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b[1] of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129[2] of the Judicial Code and therefore appealable under that section?

From the certificate it appears that the question arises upon these facts: The plaintiffs filed, in a New Jersey State Court, a complaint in five counts to recover amounts alleged to be due plaintiffs by the defendant on life insurance policies issued by it upon the life of Richard Ettelson, deceased. The cause was removed to the United States District Court for New Jersey. Plaintiffs demanded a jury trial. The defendant filed an answer in the District Court setting up that the policies were obtained by the fraud of the insured and are void because of material false statements made by the insured in the application for the policies. The answer did not allege that the false statements were knowingly and intentionally made.

With the answer the defendant filed a counterclaim alleging that the policies were obtained by the fraud of the insured and are void because of the material false statements made by him in

[1] 28 U. S. C. § 398.
[2] 28 U. S. C. § 227.

the application; and prayed that the policies be decreed void upon the return by the defendant of the premiums paid thereon, and that the plaintiffs be enjoined from further prosecuting the action at law. The plaintiffs moved for dismissal of the counterclaim on the ground that the defendant has an adequate remedy at law on the law side of the court in the pending action in which issue has been joined; and further that the counterclaim fails to state a claim upon which equitable relief can or should be granted by the court.

The District Court denied the motion to dismiss and ordered that the counterclaim should be heard and disposed of by the court sitting in equity prior to trial of the issue made by the complaint and answer in the action at law. The plaintiffs thereupon appealed to the Circuit Court of Appeals and the defendant moved that court to dismiss the appeal in the view that the District Court's order is not appealable.

The parties agree that, if the question had arisen prior to the adoption of the Rules of Civil Procedure,[3] our decision in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, would require an affirmative answer to the question. The defendant asserts, and the plaintiffs deny, that the rules require a negative answer. The defendant points to Rule 1 which states that the object of the rules is "to secure the just, speedy, and inexpensive determination of every action"; and more particularly to Rule 2 which declares that "there shall be one form of action to be known as 'civil action' ".

The defendant's contention, in brief, is that whereas, when the *Enelow* case was decided, the distinction between actions at law and suits in equity in federal courts still persisted, this distinction has now been abolished; that equitable defenses, whether a bar to plaintiffs' recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and the counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs. We cannot agree.

At the argument of the cause much time was devoted to the applicable law of New Jersey where the action originated. It

[3] 308 U. S. 653; 28 U. S. C. 723c.

was urged that, under that law, upon allegation and proof of innocent misrepresentations inducing the issue of a policy, an insurer is entitled to a decree cancelling the policy and restraining any action at law upon it. It was urged that this feature of the local law must be considered in determining the appealability of the District Court's order. But, whatever effect should be given the New Jersey law in determining the correctness of the District Judge's action, the local law has no bearing upon the decision of the narrow question certified.

As in the *Enelow* case, so here the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. The relief afforded by section 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made. *Enelow* v. *New York Life Insurance Co.*, *supra*, p. 383. Compare *General Electric Co* v. *Marvel Rare Metals Co.*, 287 U. S. 430, 432; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, 451; *Griesa* v. *Mutual Life Ins. Co.*, 165 Fed. 48, 49.

Question answered "Yes".

A true copy.

Test:

Clerk, Supreme Court, U. S.